

**APPENDIX S**

**Issues Facing Implementation of Certificate of Mastery, 2007-08**

**An Opinion Paper/Report Prepared for the  
Washington State Board of Education's  
Certificate of Mastery  
Study Committee**

**Prepared by  
Catherine Hardison, Ph.D., Third Year Law Student  
Seattle University Law School**

**In Consultation With  
Professor David Boerner  
Seattle University Law School**

**October 1, 2001**

September 9, 2001

Mr. Gary Gainer, President  
Washington State Board of Education  
PO Box 47206, Rm. 253  
Olympia, Washington 98504-7206

Dear Mr. Gainer,

The opinion paper attached focuses on current issues faced by the Washington State Board of Education as it moves toward its final adoption of the Certificate of Mastery (COM) as a requirement for graduation in Washington State in the year 2007-08. Please do not consider the opinion as one of legal advice because I am not yet licensed as an attorney in Washington State, but I am a third year law student, attending Seattle University Law School. The opinion paper is a result of an independent study crafted by you and SU Law School Professor David Boerner and completed by me.

The opinion paper is but one step in the State Board of Education's Certificate of Mastery Advisory Committee's considerations. The two-fold purpose of the opinion paper is to, first discuss the results of a six state survey (with California and Delaware to follow this fall) regarding issues faced by those states and, second, to help prepare the COM Advisory Committee for legal issues. These issues may follow a refusal by a school district to grant a diploma to a student who has not passed the COM examination.

The paper's second purpose is to assist the COMSC in identifying legal issues that may arise as a result of the implementation of the COM requirement in 2007-08.

Thank you so much for the opportunity to be of service to the State Board. I certainly have learned a great deal and hopefully my work will be of value to you as you move toward implementation of the COM. I know it will be to me as I move toward my goal of working as a school district attorney.

Sincerely yours,

Catherine Hardison, Ph.D., Law Student  
Seattle University Law School

Cc: Professor David Boerner

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## Issues Facing Implementation of Certificate of Mastery, 2007-08

### ***PART I***

#### ***History of School Reform in Washington State***

A brief summary of the history of school reform leading up to its current state in Washington State is necessary to lay a proper foundation this opinion paper/report for the State Board of Education's Certificate of Mastery Study Committee (COMSC). School reform has deep roots in Washington State. Two landmark court cases began the string of significant events influencing the current state of education. The cases are incorporated and filed as **Exhibit A**.

Decisions in these two cases, brought by the Seattle School District against the state legislature and governor, defined the funding of basic education by court order rather than legislative dictate. The cases upheld the Washington State Constitution declaration that education is the paramount duty of the state. However, definition of basic educational objectives was left to local school districts. *School Funding I (1978)--State Supreme Court--Decision of the Washington State Supreme Court in Seattle School. District. No. 1 v. State*, 90 Wn.2d 476, 585 P.2d 71 (1978) and *School Funding II, Seattle School. District. No. 1 v. State*, Thurston Co. Superior Court No 81-2-1713-1 (1983).

In 1977, the Washington State Legislature influenced the development of educational goals for K-12 students, namely through the enactment of the Washington Basic Education Act of 1977. The Act and its subsequent revisions required local school districts to develop Student Learning Objectives (SLOs). The Office of Superintendent of Public Instruction monitored the developmental progress of SLO's through a district "M808" monitoring visit. In any given school year, only ten percent of the districts were randomly selected for a visit. The pure randomness of selection of districts allowed for a district to be visited more than once, while others might not have a visit at all. (*M808 notes, ESD 105*)

Until 1993, no state-wide goals had been established for students. Districts were left to develop their own lists of Student Learning Objectives. As a result, coherency and consistency between districts and even among schools within a district were limited. The measurement of student achievement was accomplished mostly through classroom assessment and state-wide administration of norm reference tests, developed using testing results of many out-of-state student populations.

In 1993, the Washington State Legislature adopted the Basic Education Act for grades K-12.

The Act established four statewide Student Learning Goals (SLGs):“(1) Read with comprehension, write with skill, and communicate effectively and responsibly in a variety of ways and settings, (2) Know and apply the core concepts and principles of mathematics; social, physical, and life sciences; civics and history; geography; arts; and health and fitness; (3) Think analytically, logically, and creatively, and to integrate experiences and knowledge to form reasoned judgments and solve problems; and (4) Understand the importance of work and how performance, effort, and decisions directly affect future career and educational opportunities.” ***RCW 28A 150.210 Basic Education Act—Goal.***

The Act also established the Commission on Student Learning, a state agency governed by a board consisting of eleven members appointed by the Governor and the State Board of Education. ***RCW 28A.655.885 (Recodified as RCW 28A.655.060) Essential academic learning requirements—State-wide academic assessment system—Certificate of Mastery—Educational Pathways—Accountability—Reports and recommendations—Washington commission on student learning, creation and expiration.*** The Commission was entrusted with the development of academic content standards, i.e. Essential Academic Learning Requirements (EALRs), standards based assessments, and a results-based accountability system for schools and districts. The Commission’s work was incorporated into the Office of the Superintendent of Public Instruction (OSPI) and the Academic Achievement and Accountability (A+) Commission beginning on July 1, 1999. ***RCW 28A.655.900 Transfer of powers, duties, and functions.***

Thousands of hours were spent by professional educators, parents, business and community members, students and others to produce a comprehensive system providing opportunities for students to achieve the four Student Learning Goals. (***HB1209 File notes, ESD 105***). Essential Academic Learning Requirements (EALRs) have been developed and refined for Reading, Writing, Communication, Mathematics, Science, Economics, Geography, History, Arts, Health & Fitness. The EALRs have been distributed to all Washington State School Districts. They are also available on the OSPI website, [www.K-12.wa.us/](http://www.K-12.wa.us/).

State level assessment toolkits have been developed to assist local curriculum development efforts for the **“Early Years” grades K-4** in Reading, Writing, Communications, and Mathematics, for the **“Middle Years” grades 5-7** in Reading, Writing, Communications, and Mathematics, and for the **“Transition Years” grades 8-10** in Writing, Communications, and Mathematics. The available items are incorporated and filed as **Exhibit B**.

The toolkits are available to local school districts to help staff members ensure that the elements of the EALRs for the four SLGs are addressed for each grade level. The OSPI website has copies for easy downloading. Numerous regional and in-district workshops have been hosted by the Office of Superintendent of Public Instruction and the nine regional Educational Service Districts (ESDs).

Standards based assessments, collectively named the Washington Assessment of Student Learning (WASL), have been developed and are administered state-wide at fourth, seventh, and tenth grades. Each level of assessment was developed using outside testing experts and was piloted for the purpose of elimination of bias, and assurances of reliability and validity. State law requires successful completion of the tenth grade WASL to earn the Certificate of Mastery (COM). The Certificate of Mastery is a statutory graduation requirement. The requirement, as set by the State Board of Education, becomes effective beginning in the 2007-2008 school year. ***RCW 28A.655.060 (3) (c) Essential academic learning requirements—State-wide academic assessment system—Certificate of Mastery, and WAC 180-51-063 Certificate of Mastery—High school graduation requirement—Effective date.***

To prepare for the COM effective target date, the State Board of Education established a Certificate of Mastery Study Committee (COMSC) to investigate issues surrounding the implementation of the COM Examination. The Certificate of Mastery Study Committee is to “examine and make recommendations to the state board of education on validity and reliability issues” as well as “to conduct a review and analysis of the requirement that students obtain a certificate as a condition for graduation.” The deadline for the final report and recommendation to the State Board of Education is May 2003. ***WAC 180-51-064 Certificate of mastery—Validity and reliability study.***

The COMSC consists of the President and the Executive Director of the Washington State Board of Education, the Chair of the A+ Commission, the Director of Assessment and Evaluation for the Office of Superintendent of Public Instruction, the Vice-Chair of the Higher Education Coordinating Board, the Chair of Workforce Training and Education Coordinating Board Executive Policy Advisor, Governor’s Executive Policy Office, the Vice president of the Washington Roundtable, a high school student, a representative from the Washington Alternative Learning Association, a retired teacher, a high school principal, a middle-school principal, a director of a

district's research and professional growth department, a district superintendent, a school director, and finally, the manager of educational policy and contributions for a bank. The list of current membership is incorporated and filed as **Exhibit C**.

To begin, the initial presentation of the opinion paper/report will focus on six states which either have or are about to adopt high-stakes graduation tests. Each state has responded to an eighteen part survey, incorporated and filed as **Exhibit D**, and the discussion will focus on the responses. The states are Alaska, Arizona, Indiana, Massachusetts, North Carolina, and Wisconsin. Each state was cited as a state either reconsidering or having made changes in its educational system exit exams in an article, "Schools Failing with Exit Exams," written by Charles Ornstein of the Knight Ridder News Service and published in the Salt Lake Tribune, March 11, 2001. Two other states, California and Delaware, will respond to the survey in September/October, and the results will be forwarded onto the COMSC. Two other states, Delaware and Virginia have not yet responded.



## PART II

### A Closer Look at Six States

#### Alaska

In 1997 and 1998, the Alaska State Legislature passed the Quality Schools Initiative. The legislation calls for a complete overhaul of the public school system in order to enable students to meet high academic standards.

With the assistance of testing experts from CTB-McGraw Hill, Alaska has been developing an exit exam for a high school diploma, the High School Graduation Qualifying Examination (HSGQE). A publication, “A Work Plan: 2002-2006, To Implement Alaska’ Public School Accountability Initiative for Improving Student Achievement,” is incorporated and filed as **Exhibit E**. According to Dr. Richard Smiley, Assessment Director, Alaska Department of Education and Early Development, the legislature allowed an extension of the implementation of the HSGQE to February 2004, because it was worried about student opportunity to learn.

The plan has several categories of interest to the Washington State Board of Education. It has sections dealing with the Issue of Special Needs Students, Upgrading and Aligning Performance Standards to Classroom Instructional Material, Professional Development, Designing Intervention Strategies for Students Not Meeting Benchmark or High School Exam Standards, Developing Core Courses in Small Schools with Expert Teachers in Reading, Writing and Math, and Strengthening Legal Validity of Alaska High School Graduation Qualifying Exam. Our neighbors to the North are struggling, as are we, to find answers to many of the same questions and issues. Also being asked are some different, but nonetheless compelling questions, for Washington State to consider. For example, has COMSC considered the possibility of building, field testing, and implementing a School Designator System?

Of particular interest to SBE Members is Alaska’s Work Plan proposal to strengthen the legal validity of the Alaska High School Graduation Qualifying Exam by allowing students the opportunity to have completed a sequence of benchmark examinations in grades 3, 6, and 8 before they will take the HSGQE. As part of the plan, intervention strategies will be applied to students as needed. Washington State has a similar series of benchmark exams (Washington Assessment of Student Learning—WASL) for students at grades 4, and 7, before the Certificate of Mastery examination is to be given to tenth graders.

Alaska's approach to alternative assessment is to include most students with disabilities in the general course of study. The students will be assessed either with or without accommodations using both the Benchmark Exams and the HSGQE. A small percentage, approximately 2% of the total student population, identified as having "significant cognitive disabilities and adaptive skill levels that prevent completion of the standard academic curriculum even with modification and accommodations," will be assessed using alternative standards and an alternative assessment system. A draft of a detailed overview of the system is incorporated and filed as **Exhibit F**. The assessment has the unique quality of remaining attached and consistent with the state standards, yet will use alternative performance standards based on the same Alaska content standards for all student. During the school year a teacher and parents will collect a portfolio of evidence to determine the level of proficiency of each student in achieving the alternative standards.

The consequence for an Alaskan high school student not passing the HSGQE is denial of the award of a high school diploma. Sophomore students will be given the HSGQE beginning in the spring of 2004. Chances to pass will be given twice the junior and twice the senior year. The test will be given in different forms each time.

Alaska's advice, via Dr. Smiley, to Washington State is to not set the bar too high as did Massachusetts, but to set the bar low enough so the test does not alienate students and parents. To determine whether teachers actually teach to the standards, Alaska will use an "Opportunity to Learn Survey," given to teachers at the benchmark grade levels where students are tested, 3rd, 6th and 8th. Teachers will be asked directly, "Did you teach..." In the tenth grade students will be surveyed and asked if they were taught the standards.

Finally, the law in Alaska allows a local school board to grant a waiver to students, allowing them not to take the HSGQE. In the past high school special education students received a diploma. However, it is unclear at this time, due to waivers and alternative assessments, whether the practice will continue.

Alaska's contact is Dr. Richard Smiley, Assessment Director, Alaska Department of Education and Early Development, [Richard\\_Smiley@eed.state.ak.us](mailto:Richard_Smiley@eed.state.ak.us). He is eager to help the WSSBE in any way he can.

## Arizona

Arizona administers the norm-referenced Stanford 9 to ninth graders. They also administer a criterion referenced, “Arizona’s Instrument to Measure Standards,” the AIMS, to high school students beginning in tenth grade. Students take each part of the test until they meet or exceed the standard.

AIMS is a high stakes test. The reading and writing parts are graduation requirements for the class of 2002, and math is added for the class of 2004. However, the dates for AIMS as a graduation requirement are under review by the Arizona State Board of Education and may change, most likely to be pushed further into the future.

AIMS is a test developed to specifically measure the Arizona Academic Standards. National Computer Systems (NCS) was a partner in the development of the examination. A technical report as to the developmental process of AIMS is produced by CTB, and is on the Arizona Department of Education website, [www.ade.state.az.us](http://www.ade.state.az.us). To help assure validity and reliability, the Superintendent of Public Instruction/Department of Education is, “In the process of item mapping, developing a history of each item, listing each and every event that took place in the development of AIMS and supporting each event with documentation, and noting when decisions were made and why they were made. It is an on-going and tedious process,” according to Dr. Paul S. Young, Director of Academic Standards and Accountability.

As to legal challenges to the high school exit test (AIMS), a local newspaper filed a Freedom of Information Act (FOIA) against the Department of Education demanding release of all test items on Form A of the high school tests (reading, writing, and mathematics). Incorporated and filed as **Exhibit G** are the details of the struggle in court. Eventually the Department lost the battle and had to disclose all but the anchor items of Form A, the only form of the test fully developed. The judge did not clearly define what the anchor items were and instead asked the Department to determine the items. The released items have been placed on the website.

Special Education students are included in state assessments because Arizona interprets the federal Individuals with Disabilities Act (IDEA) 97 as requiring all students be included in state assessments. However, a functional level of achievement was developed within the context of the already existing Arizona Academic Standards. The Functional level is expected to involve only 1%-2% of the student population and is designed for students, ages 3-21, with significant disabilities. Each student deemed in need of a functional level approach must have an Individualized Education Program (IEP). All parts of the IEP must be developed with the Academic Standards as the foundation and help

students advance in the regular curriculum. The Functional level has four standards areas, 1) Comprehensive Health (including Physical Activity Standards), 2) Language Arts, 3) Mathematics, and 4) Workplace Skills.

Test accommodations in Arizona are made by the IEP team. Arizona does not have a list of approved test accommodations. Special education students must pass the AIMS to be granted a diploma. Scores on the test are placed on high school transcripts.

English as a Second Language (ESL) students have been exempted from taking the AIMS and a Spanish Language test is offered instead. However, Proposition 203, passed by voters in November 2000, requiring all instruction to be in English, has cast some doubt on the continuation of the Spanish Language Test. An Arizona Attorney General Opinion is incorporated and filed as **Exhibit H**. In Washington State, students are required to be taught in the English Language, unless teaching in another language would aid the “educational advancement of the student.” **RCW 28A.230.030**  
***Students taught in English language— Exception, WAC 180-50-115(2) Mandatory areas of study in the common school.***

To collect evidence to verify that students had an opportunity to learn before taking the AIMS, Arizona has a “school report card” administered by the Arizona Department of Education. Each school submits data for eventual publication. Included within the detail of the report card are four questions addressing standards and alignment to the school’s curriculum. The questions are, “Was your curriculum aligned to EACH of the Arizona Academic Standards in the following nine content areas by the beginning of your 1999-2000 school year?; Will ALL your students be given opportunities to learn EACH of the standards in the following nine content areas in the classroom within the 1999-2000 school year?; Will you regularly assess progress on EACH of the standards in the following nine content areas within the 1999-2000 school year?” and “Will you regularly report progress on EACH of the standards in the following nine content areas to students and parents within the 1999-2000 school year?” The nine content areas are Reading, Writing, Mathematics, Science, the Arts, Comprehensive Health, Foreign Language, Technology, and Workplace Skills.

The Department believes it will have to gather more information as the time approaches for the implementation of AIMS as a graduation requirement. A sample school report card is incorporated and filed as **Exhibit I**.

Although not mentioned by the Arizona State contact, one practice in the state that could be the source of tension as the AIMS is put into practice is the division of authority into two state policy boards. One policy board is the State Board of Education, responsible for supervision and regulation of the public school system. The other board oversees vocational and technology education in the public school system. One can envision conflicts as to the implementation of AIMS as a graduation requirement because each board may have differing opinions about the actual process of administration, content of criterion and weight of each, and the amount of emphasis on criterion involving vocational and technological skills.

Finally, Arizona's pending implementation of AIMS as a graduation requirement is the target of a May 17, 2001, Office of Civil Rights (OCR) complaint raised by the William E. Morris Institute for Justice. A copy of the OCR Complaint is incorporated and filed as **Exhibit J**. The OCR Complaint raises the concern of disparate impact of high stakes testing as witnessed in employment discrimination law when potential employees are tested. The complaint raises the issue in the context of the potential significant negative disparate impact upon minority students when the AIMS is implemented.

The Arizona contact is Dr. Paul S. Young, [pyoung@ade.az.gov](mailto:pyoung@ade.az.gov). He is willing to keep the COMSC apprised of the results of the OCR complaint.

### **Indiana**

High School students in Indiana take a Graduation Qualifying Examination (GQE). The GQE is part of a tenth grade statewide test, the Indiana Statewide Test for Educational Progress or "ISTEP+". The GQE is a minimum proficiency test and assesses ninth grade proficiency in mathematics and English/language arts.

Indiana does not have a "sole criterion" approach to high stakes testing. The state developed a rule and later a statute providing a safeguard to permit negative results on the GQE to be "waived" and declared not valid or reliable for a particular student. However, threshold requirements must be met by the student before a "waiver" can even be raised as a possibility. Those thresholds are best understood by a citation of the statute, IC 20-10,1-16-13, from contact Kevin McDowell, General Counsel, as follows;

“IC 20-10.1-16-13

Sec. 13

- (a) Beginning with the class of students who expect to graduate during the 1999-2000 school year, each student is required to meet:
  - (1) the academic standards tested in the graduation examination; and
  - (2) any additional requirements established by the governing body; to be eligible to graduate.
- (b) A student who does not meet the academic standards tested in the graduation examination shall be given the opportunity to be tested during each semester of each grade following the grade in which the student is initially tested until the student achieves a passing score.
- (c) A student who does not achieve a passing score on the graduation examination may be eligible to graduate if all of the following occur:
  - (1) The principal of the school the student attends certifies that the student will within one (1) month of the student's scheduled graduation date successfully complete all components of the Core 40 curriculum as established by the board under IC 20-10.1-5.7-1.
  - (2) The student otherwise satisfies all state and local graduation requirements.
- (d) A student who does not achieve a passing score on the graduation examination and who does not meet the requirements of subsection (c) may be eligible to graduate if the student does all of the following:
  - (1) Takes the graduation examination in each subject area in which the student did not achieve a passing score at least one (1) time every school year after the school year in which the student first takes the graduation examination.
  - (2) Completes remediation opportunities provided to the student by the student's school
  - (3) Maintains a school attendance rate of at least ninety-five percent (95%) with excused absences not counting against the student's attendance.
  - (4) Maintains at least a "C" average or the equivalent in the courses comprising the credits specifically required for graduation by rule of the board.
  - (5) Obtains a written recommendation from a teacher of the student in each subject area in which the student has not achieved a passing score. The recommendation must:
    - (A) be concurred in by the principal of the student's school; and
    - (B) be supported by documentation that the student has attained the academic standard in the subject area based upon:
      - (i) tests other than the graduation examination; or
      - (ii) classroom work.
  - (6) Otherwise satisfies all state and local graduation requirements.
- (e) This subsection applies to a student who is a child with a disability (as defined in IC 20-1-6-1). If the student does not achieve a passing score on the graduation examination, the student's case conference committee may determine that the student is eligible to graduate if the case conference committee finds the following:

- (1) The student's teacher of record, in consultation with a teacher of the student in each subject area in which the student has not achieved a passing score, makes a written recommendation to the case conference committee. The recommendation must:
  - (A) be concurred in by the principal of the student's school; and
  - (B) be supported by documentation that the student has attained the academic standard in the subject area based upon:
    - (i) tests other than the graduation examination; or
    - (ii) classroom work.
- (2) The student meets all of the following requirements:
  - (A) Retakes the graduation examination in each subject area in which the student did not achieve a passing score as often as required by the student's individualized education program.
  - (B) Completes remediation opportunities provided to the student by the student's school to the extent required by the student's individualized education program.
  - (C) Maintains a school attendance rate of at least ninety-five percent (95%) to the extent required by the student's individualized education program with excused absences not counting against the student's attendance.
  - (D) Maintains at least a "C" average or the equivalent in the courses comprising the credits specifically required for graduation by rule of the board.
  - (E) Otherwise satisfies all state and local graduation requirements.

As added by P.L.340-1995, SEC.68. Amended by P.L.146-1999, SEC.11; P.L.193-1999, SEC.2.”

Indiana, in relation to IC 20-10.1-16-13, does use the GQE, which is based on the state's academic standards and the reflections of what SHOULD be taught in the classrooms of its accredited schools. The test was developed by first developing academic standards, named Curriculum Proficiency Statements. Test items were evolved through a piloting process, which included serious attention to standard practices for eliminating test bias and establishing reliable and valid indicators. The GQE has a norm reference portion of the ISTEP+ remaining as a proprietary interest of CTB/McGraw Hill, and is used to determine national measurements.

If an Indiana student does not pass the GQE, he/she will not receive a high school diploma, unless he/she can demonstrate, through other reliable, valid means, he/she has met those Curriculum Proficiency Statements assessed in the GQE. Students with disabilities are not exempt from the GQE. If the students are projected to be in a “diploma track,” reasonable accommodations are identified in their IEPs. If a student has a disability for which standardized assessment is deemed inappropriate by the IEP Team, (Case Conference Committee in Indiana), the student will be assessed through alternative means documented in the IEP.

The only students exempted from the GQE are those for whom participation would be inappropriate (IEP'ed), or students who have such a low level of functioning in the English Language they would be precluded from examination. Beyond those two groups, a defined list of accommodations does not exist.

However, accommodations for the GQE/ISTEP+ must meet three standards. The accommodations must be; (1) reasonable (so as to not affect reliability and validity of any particular section of the assessment), (2) documented in the student's IEP (or accommodation plan), and (3) not be defined only for use on state-wide assessments, but for all assessments given to the student. All reasonable assessments must be student-specific and cannot be applied to a classification, such as a group of learning disabled students.

Indiana does not grant differentiated diplomas. If a student is incapable of earning a high school diploma, a Certificate of Completion can be given for successful completion of the goals, objectives, and benchmarks outlined in his/her IEP.

A legal challenge has been made to Indiana's GQE by a student, Meghan Rene and her parents and Next Friends, Michael and Robin Rene, et al. The challenge was a claim that the GQE is unconstitutional as applied to students with disabilities. According to Mr. McDowell, the plaintiff class (there are two distinct classes, actually) asserted four claims. First, the plaintiffs claimed they were not exposed to the material being assessed (the academic standards); second, they had been awarded diplomas in the past based on completion of the individual IEPs; third, accommodations were not permitted in the administration of the GQE/ISTEP+, and, fourth, there was inadequate notice to the class prior to the initial administration of the test.

Indiana's counter arguments were as follows; (1) the academic standards have been in place since 1993, (2) the state does not have differentiated diplomas, (3) no student would receive a diploma just by satisfying the stipulations of an IEP, (4) accommodations are allowed, so long as they are reasonable, others, such as reading the reading comprehension part of the test to the student, are not, (5) notice has been more than adequate. In addition, the state argued that it had provided procedural safeguards and remediation to students who had identified deficiencies.



At the trial court level, the court found in favor of the state. On June 20, 2001, the Indiana Court of Appeals upheld the trial court's decision. *Rene vs. Reed, Court of Appeals of Indiana*, No. 49A02-0007-CV-433. A copy of the appeal is incorporated and filed as **Exhibit K**, and a comment paper to the National Council of State Education Attorneys (NCOSEA), authored by Mr. Kevin McDowell, is incorporated and filed as **Exhibit L**.

Indiana's contact person is Kevin McDowell, General Counsel, [kmcdowel@doe.state.in.us](mailto:kmcdowel@doe.state.in.us). He also offered a website for further research, [www.doe.state.in.us/legal/](http://www.doe.state.in.us/legal/), as well as information in the ISTEP Program Guide, a legal document incorporated by reference in both statute and regulation.

### **Massachusetts**

Massachusetts gives English/Language Arts, Mathematics, History and Social Science, and Science and Technology tests to high school students. The state will require students in the class of 2003 to pass the grade ten English Language Arts and Mathematics state tests (Massachusetts Comprehensive Assessment System or MCAS) in order to graduate.

In addition to passing the MCAS, the students will have to meet local graduation requirements for coursework, grades, conduct, etc. Students who do not pass the grade ten MCAS, will be given four additional opportunities to re-take the test before their scheduled graduation date.

To assure alignment with the Massachusetts Curriculum Frameworks, the MCAS was developed as a custom designed instrument by the Massachusetts Department of Education, with assistance of committees of teachers and a testing contractor. As noted in the MCAS Technical Reports posted on the website, [www.doe.mass.edu/mcas](http://www.doe.mass.edu/mcas), the state has taken steps to ensure reliability and validity and consistency with the American Educational Research Association recommended standards. The AERA Position Statement Concerning High Stakes Testing in Pre K-12 Education is incorporated and filed as **Exhibit M**.

If a student does not pass the grade ten MCAS in English Language Arts and Mathematics, he/she is eligible to receive academic support services. He/she may receive mentoring, tutoring, and summer and after school intensive instruction. The funding for the additional support is funded through a special state appropriation.

Special Education students are not exempted from the grade ten MCAS. The student's IEP team makes one of three decisions; the student participates 1) in the standard testing experience, 2) in the standard test experience with accommodations, or the student 3) requires an alternative assessment.

More information is available in the document, “Participation of Students with Disabilities in MCAS,” available on the website, [www.doe.mass.edu/mcas](http://www.doe.mass.edu/mcas).

Beginning with the class of 2003, special education students will be eligible to receive a high school diploma. The students must pass the grade ten English Language Arts and Mathematics MCAS tests, or demonstrate they have an equivalent level of knowledge and skill on the MCAS alternative assessment. In addition, they also must meet any local graduation requirements.

The only students who are exempted from the MCAS are those who have Limited English Proficiency (LEP) and have attended school in the United States for less than three years. Again, more information is available on the website, [www.doe.mass.edu/mcas](http://www.doe.mass.edu/mcas).

Massachusetts has developed procedures, processes, and other means to collect evidence to verify that students have had an opportunity to learn before taking a high stakes exam, i.e., passage required before award of a diploma. Among the evidence collection is a state accountability system for schools and district as well as a school performance rating process. Each assesses and reports on whether and how schools are meeting selected expectations. Among those expectations reported is the level of implementation of the Massachusetts learning standards and curriculum frameworks. To help determine the level of implementation, the standards and frameworks are used in MCAS assessment instrument.

However, the state is considering what additional evidence needs to be collected to prepare for a legal defense to prove students have ample opportunity to learn the standards before taking the MCAS.

According to Rhoda E. Schneider, General Counsel, Massachusetts Department of Education, the state has not yet received a legal challenge to the MCAS. However, she anticipates challenges similar to what other states are facing. She also suggests COMSC members read Education Week because it, “does a good job reporting on challenges to state testing/graduation requirements in various states.”

The contact for the paper was Massachusetts is Rhoda Schneider, General Counsel, Massachusetts Department of Education. Ms. Schneider requests we use the Department of Education website at [www.doe.mass.edu](http://www.doe.mass.edu), because all information related to the state’s assessment program (MCAS) is posted there, along with lots of other information on education programs, new initiatives, and relevant statutes and regulations. Ms. Schneider also suggests contacting Jeff Nellhaus, who heads the assessment program for the state.

### **North Carolina**

North Carolina did not answer the survey via the Internet, but instead chose to report via telephone interview. During the interview, Dr. Lou Fabrizi, Director, Division of Accountability Services, made several references to the state's comprehensive website. Information on the website is very forthcoming. Perusing it is well worth the time. The following publications are available; 1) Instructional Strategies for the NC High School Exit Exam, 2) NC Course of Study Graduation Requirements for the four courses of study, 3) High School Exit Exam Overview and Check Off Lists, 4) Curriculum Matrices for the NC High School Exit Exam. The address for those so inclined is [dpi.state.nc.us](http://dpi.state.nc.us) for the main State Board of Education and the Department of Public Instruction. More specifically, for assessment information the address is, [ncpublicschools.org/student\\_promotion](http://ncpublicschools.org/student_promotion). A sample list of topics is incorporated and filed as **Exhibit N**.

A June 7, 2001, press release from the website addressed a concern expressed by parents, educators, members of the General Assembly and the public about the amount of time the state requires students to be in testing. As a result, the North Carolina State Board eliminated three tests for this school year (2001-02). However, the core of the accountability program was kept intact. The core consists of annual assessments in reading and mathematics in grades 3-8, core courses in grades 9-12, and an exit exam planned for the 2003-2004 junior class. In addition to the exit exam, students in grades 3, 5, and 8 are required to meet statewide standards before promotion to the next grade.

In January of 2001, the North Carolina Board of Education added two years to the exit exam deadline and moved it to the 2003-2004 school year. Two reasons were given for the additional years. First, teachers still did not know enough about the test and second, no sample items for teachers and parents had been produced. In the Spring of 2004, juniors will take the exit exam. If they fail the exam, they will have four more opportunities, 1) summer school, 2) fall of their senior year, 3) spring of their senior year, and 4) the last month of their senior year. Schools are expected to provide focused remedial instruction for students who need to re-take portions of the exit exam. Students labeled as exceptional will be given accommodations as indicated in their Individualized Education Plan (IEP), Section 504 Plan, or Limited English Proficiency Plan (LEP).

The state considers the denial of a diploma to a student who fails the exit examination on the same level as a denial for a lack of certain credits in a subject area or a specific number of credits. The exit examination is simply one of many steps a student must complete before a diploma is awarded.

The High School Exit Exam (HSEE) covers state wide standards, called Gateways, and will measure how well students: 1) communicate through reading and writing; 2) process and use information from a variety of sources; 3) solve problems; and, 4) use numbers and data. The exam covers skills already typically learned in English, Mathematics (through Algebra I), Science (including Biology), and Social Studies topics such as U. S. History and Economic, Legal, and Political Systems.

Four tests will be given: 1) Communication, 2) Processing Information, 3) Problem Solving, and 4) Using Numbers and Data. Certain expectations have already been published and listed for students. Those expectations are: 1) multiple choice questions, 2) two hours per test given over two to three days of testing, 3) answering questions based on graphs, charts, and reading passages, 4) test questions requiring application, evaluation and analysis of information from a variety of sources, 5) mathematical formulas, periodic tables, and graphing calculators will be allowed during the exam, and 6) a cut score, i.e. passing score, will be in place for each test of the exit exam.

The HSEE was developed using Riverside Publishing Company. It was field tested in the spring of 2000 and North Carolina plans to pilot the test for two years before its implementation. The state assured technical validity and reliability by linking the test items to the North Carolina Standard Course of Study. The Department of Education's Curriculum Staff was instrumental in assuring the test's validity and reliability.

At this point the state has not received any legal challenges. If legal challenges are to arise, the state anticipates two areas of controversy, 1) adequate preparation of teachers, and 2) adequate instruction of students. No exemptions from taking the High School Exit Exams are granted. Recently, the Office of Civil Rights has questioned the state education department about students who have, "dyscalculia," a mathematics learning disability. Algebra is on the exam and the OCR claim is that students with "dyscalculia" will not be able to pass the mathematics section. At this point, the state has not answered the claim because it is not sure how to, or if it can, adjust the cut score to accommodate these students.

Special Education students are not exempt from the HSEE. A recommendation for differentiated diplomas was made to the North Carolina State Board of Education. The SBE denied the recommendation, instead opting for four courses of study; 1) career prep, 2) college tech prep, 3) college/university prep, and 4) occupational. Three test accommodations have been implemented: (1) the test is available in large print; (2) the test is available in Braille; and, (3) the reading the test to students is allowed.

Dr. Lou Fabrizi, gave two references for further inquiry. One was Dr. Greg Cizek, a professor at University of North Carolina. Dr. Cizek's article, "Unintended Consequences of High-Stakes Testing," is incorporated and filed as **Exhibit O**. The other reference was Dr. Susan Phillips, a researcher who continues to seek out legal issues facing states who have or will implement high stakes tests.

Dr. Phillips recommended three references; 1) *GI Forum v. TEA*, the 2000 Texas district court decision regarding the Texas graduation test, 2) a publication distributed by NCREL, Oak Brook, Illinois, dealing with high stakes testing, and 3) a Fall 2000 special issue of Applied Measurement in Education focusing on the Texas case and needed provisions for defensible graduation tests, published by Lawrence Earlbaum located somewhere in NJ. The COMSC has copies of *GI Forum v. TEA*, and I am in the process of locating the other two references. Dr. Phillips was quoted extensively in the *G.I. Forum v. TEA* case. She may be available to help consult with the COMSC, especially for test validity and reliability issues. Her e-mail address is [PhillipsSE@earthlink.net](mailto:PhillipsSE@earthlink.net). Dr. Phillips wants the COMSC to clearly note she does not represent a particular state, but works with a number of states on their high-stakes statewide testing programs.

The North Carolina Contact is Dr. Lou Fabrizi, Director, Division of Accountability Services. He can be reached at [Lfabrizi@dpi.state.nc.us](mailto:Lfabrizi@dpi.state.nc.us).

### **Wisconsin**

Wisconsin has spent five years in preparation for the implementation of statewide graduation testing in the fall of 2002. In December of 2001, the state will carry out a "forms standardization" study and a "standards setting" administration (no fault for all 10th graders).

Currently, Wisconsin administers a Grade 10 Statewide Assessment, CTB McGraw Hill Multiple Assessment (high school grade) plus the CTB Writing Program at grade level. By state law, a graduation test will be one element of a new graduation policy effective Spring of 2004. The first of four administrations begins in the fall of 2002.

The Wisconsin High School Graduation Test (HSGT) was developed under the terms of a contract for customized test design with CTB/McGraw Hill. Under terms of the contract, the vendor and the agency designed a process for alignment with the Wisconsin Model Academic Standards at Grade 12. Included were item format, test design, item pilot testing, forms standardization and standards setting. The standards were set based on the Standards for Educational

and Psychological Testing published by the American Educational Research Association. Again, the AERA Position Statement Concerning High Stakes Testing in Pre K-12 Education is incorporated and filed as **Exhibit M**.

The HSGT measures four academic subjects, English/Language Arts, Mathematics, Science, and Social Studies. All of the skills and abilities on the test are found in the Wisconsin Model Academic Standards. Each examination is worth approximately 80 score points and will take about three hours to complete. Student scores with accompanying interpretations will be available to students, parents, teachers, administrators, and the public.

The impact of the HSGT on students is the requirement that students take the test and the scores must appear on the student transcript. An interesting side note is a statutory provision allowing a parental choice to opt students out of testing. Any student can be opted out of any statewide testing administration by his/her parent. If not opted out by the parent, special education students are not exempt from the HSGT unless the IEP provides for and justifies the use of an alternative assessment. The alternative assessment must be based on the Wisconsin Model Academic Standards. A working draft of allowable accommodations is available on the website.

Special education students, as well as all other high school age students, can receive a diploma without passing the HSGT. However, all transcripts must indicate if a graduate has or has not taken the HSGT.

After discussion with the Wisconsin State Attorney General's Office, Wisconsin Education Department's Legal Counsel was given the responsibility to provide technical assistance for legal issues. Wisconsin has not had a legal challenge to the HSGT, however, Wisconsin Educational Department's Legal Counsel anticipates two areas of possible litigation.

First, the test is written in English only, thereby raising a challenge from Limited English Proficient test takers. Second, although the allowable accommodations for students with disabilities are aligned with recommendations for accommodations for students with special needs published by Dr. Steve Elliott, of University of Wisconsin, Madison, if local test proctors are not properly trained in procedures, a challenge to fair test administration remains a possibility.

To verify a student had an opportunity to learn before taking the HSGT, Wisconsin uses an Opportunity to Learn Survey process. The state began surveying in 1998 and will continue until the first cohort group takes the HSGT in the spring of 2004. Preparations are now being made to publish interim findings in January of 2002 as a way to assist standards setting in June 2002. Additionally, the

state has contracted with a research firm to conduct “student focus-group research.” The focus groups will be selected from local districts and students will be surveyed as to their opportunity to learn the Wisconsin Model Academic Standards as they were tested. A trial run of focus group surveys was conducted in 2000-01 and a formal study is being prepared for implementation in Spring 2002.

Wisconsin’s contact is Dr. Maggie Burke, the Wisconsin HSGT Development Director. Her four suggestions to the COMSC are as follows. **First**, “Establish a working plan for stakeholder input and test design based on two publications, 1) Bill Meherens and Linda Bond’s, “Issues and Recommendations Regarding Implementation of High School Graduation Tests,” published by the North Central Regional Education Lab (NCREL) and 2) Dr. Susan Phillips’ “Legal Implication of High Stakes Assessment—What States Should Know.” A copy of Dr. Phillip’s work is not available on the internet and is not yet an exhibit attached as part of this opinion paper/report.

**Second**, Burke recommends following the requirements established by and published in the American Education Research Association’s, “Standards for Educational and Psychological Testings.” Again, the AERA Position Statement Concerning High Stakes Testing in Pre K-12 Education is incorporated and filed as **Exhibit M**.

Burke’s **third** recommendation is for the COMSC to study the works of Dr. Steve Elliott, University of Wisconsin, Madison, dealing with allowable accommodations for students with special needs.

**Finally**, Burke recommends the COMSC design and develop a high stakes high school exit exam with the help of a professional test developer/publisher. She suggests test-publishers are well-versed in the special circumstances surrounding test development. The special circumstances include issues such as copyright and validity/reliability, topics easily handled by individuals within the testing industry.

Maggie Burke’s e-mail address is [maggie.burke@dpi.state.wi.us](mailto:maggie.burke@dpi.state.wi.us).

\* \* \* \* \*

Because the discussion of other states’ survey responses is now complete, the focus of this opinion paper/report now switches to legal issues faced by the Washington State Board of Education as the Certificate of Mastery moves toward implementation in 2007-08.

This focus will be on legal issues facing the six states, as well as Washington state, as high school high states exit examinations have been or soon will be implemented. Discussion includes the right of a state legislature to dictate school educational policy, the deference of courts to legislatively dictated policy, and the assignment of specific responsibility of public education to state legislatures.

Further, the opinion paper/report will deal with the much quoted *Debra P. v. Turlington* cases and their holdings as to what decisions a court will and will not make concerning public education. The *Debra P.* court was specific in what it did not hold in reference to the award of a diploma, attendance requirements, and what is imperative to happen when passage of a high-stakes literacy examination is required before a diploma is awarded.

As a result, specific legal issue foci are; (1) High School Diploma as a Property Right, (2) Incorporating the Essential Academic Learning Requirements into Instruction, Measuring What has Been Taught, (3) Disparate Impact, (4) Reliability, (5) Validity, (6) Proper Notice, and (7) Special Student Populations.



## PART III

### Legal Issues

#### Introduction

The right of a state legislature to dictate state educational policy is well established law. Justice O’Conner was explicit in her opinion in a 1990 United State Supreme Court decision, “Given the deference due ‘the duly enacted and carefully considered decision of a coequal and representative branch of our government, we do not lightly second-guess such legislative judgments, particularly where the judgments are based in part on empirical determinations. *Board of Education v Mergens*, 496 U.S. 226, 251 (1990). Further, when dealing with issues in education, the U. S. Supreme Court defers to the complexity of financing and managing a state education system, in that there is more than one constitutionally permissible way of solving problems within the system. *San Antonio Independent School District v. Rodriguez*, 411 U.S., 1, 41 (1973). The Court further stated a reluctance to impose inflexible constitutional restraints on school systems because the restraints could, “circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems. . .” *Id* at 43.

It is also well settled law that courts must defer to legislatively dictated policy, so long as a legislature does not use its power to unconstitutionally deprive/disadvantage minority individuals. *G.I. Forum v. Texas Education Agency*, United States District Court, Western District of Texas, San Antonio Division, No. SA-97-CA-1278-EP, p.2. For a legislature to do so is to invite close scrutiny of constitutional issues, hardly a wise step for any state.

State legislatures have been given specific responsibility for public education of a state’s student residents. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 42 (1973). States have also been informed specifically what courts do not do in relation to public education. A much cited 1981 case from the Fifth Circuit, *Debra P. v. Turlington*, was decided by a panel of judges, rather than *en banc*. 654 F.2d 1079 (1981). As a result, two other non-panel, Fifth Circuit judges filed dissenting opinions.

In response to the dissenting opinions, the Panel filed a specific statement as to what decisions the Panel **did not** make. The opinion is worthy of a direct quotation because it can be used as a baseline to compare the relevant parts to issues faced by the COMSC. It is as follows:

“Specifically the panel assigned to this matter did not:

- a. Forbid a state from providing quality education.
- b. Decree that the aim of public education is to confer a diploma and not to educate.
- c. Find that black children were not ready for quality education
- d. Order any educational requirements (high or low) for a state school system.
- e. Inject itself in any way in the curriculum of the state school system.
- f. Suggest that black students be treated differently from white students.”

1079

For the purposes of this opinion paper/report, the specific focus will concern the Washington State Legislature’s actions in *RCW 28A.150.210 Basic Education Act Goals, RCW 28A.655.010 Washington Commission on Student Learning—Definitions, and RCW 28A.655.060 Essential Academic Learning Requirements—State-wide academic assessment system—Certificate of Mastery—Educational Pathways—Accountability—Reports and Recommendations— Washington Commission on Student Learning, creation and expiration.*

In *RCW 28A.655.060(3)(c)*, the Legislature established a Certificate of Mastery (COM) as a graduation requirement, earned by passing the secondary WASL.

Several potential legal issues face the State Board of Education as the Certificate of Mastery is implemented and the passage of a COM Examination is required for issuance of a high school diploma. Fortunately, for the COMSC, courts have dealt historically and very recently with the issue of high stakes testing in K-12 public education systems.

Using as a cornerstone a recent case, *GI Forum v. Texas Education Agency*, filed on January 7, 2000, in the United States District Court, Western District of Texas, San Antonio Division, this opinion paper/report will outline potential legal pitfalls for the COMSC. (Civil Action No. SA-97-CA-1278-EP) *G.I. Forum* is incorporated and filed as **Exhibit P**.

*G.I. Forum* involved a challenge to the requirement of successful passage of the Texas Assessment of Academic Skills (TAAS) by students for graduation. The issue was whether the requirement unfairly discriminates against minority students or violates their due process rights.

After hearing testimony and evidence presented during a five week trial, the Court held the TASS did not have an “impermissible adverse impact on Texas’s minority students and does not violate their right to due process of law.” *Id* at 2.

Moving to the specific legal issue foci for this opinion paper/report, the reader is reminded those issues are; (1) High School Diploma as a Property Right, (2) Incorporating the Essential Academic Learning Requirements into Instruction, Measuring What has Been Taught, (3) Disparate Impact, (4) Reliability, (5) Validity, (6) Proper Notice and (7) Special Student Populations.

## High School Diploma As A Property Right

If the diploma is determined to be a property right, it follows a student has certain constitutionally guaranteed rights. Foremost is the guarantee that a property right cannot be denied without due process of law. *Amendment V, U. S. Constitution*. 1791

To determine the level of a student's property interest in a diploma, one case continues to be seminal, *Debra P. v Turlington*, (654 F.2d 1079) The recent case opinion, *G.I. Forum v. Texas Education Agency*, focused on the possibility of unfair discrimination against minority students. The *G. I. Forum* opinion states, "Only one case cited by any party is both controlling and directly on point—*Debra P. v. Turlington*, 644 F.2d 397 (5th Cir.1981)" The *G.I. Forum* court used 644 F.2d 397 (decided May 4, 1981) as its citation. However, a third clarifying opinion was offered by the Fifth Circuit on September 4, 1981, cited as 654 F.2d 1079.

The reason for the ongoing viability of *Debra P.* is most likely the fact the case actually appeared five times in the Fifth Circuit. Due to remands and clarifications, the case took five years to settle. Again, the most clear definition came from the third time the case came to court (654 F.2d 1079). The opinion was also very clear about what **was decided** in the May 4, 1981 (644 F.2d 397) case . For COMSC use, the salient part of the holding is quoted as follows:

"What the record in this case clearly establishes and what the panel of this court did hold includes:

- a. That a diploma has a unique value in the market place.
- b. That the state of Florida requires attendance in school between certain ages.
- c. That the state of Florida has established a public school system.
- d. That if certain attendance requirements are met and if specific courses of study are satisfactorily completed (passed) a diploma will be awarded.
- e. That mutual expectations are thus created between the state and the students.
- f. That if a student complies with the established requirements and if he or she has satisfactorily passed these required courses of study, there is a **property right** (emphasis added) in the expectation of a diploma.
- g. That if a state is going to impose as a condition for receipt of a diploma a functional literacy test over and above whatever tests, examinations or grading requirements exist for specific single classes (world history, business, mathematics, etc.), that test must be a fair test of material presented within those required courses of study.
- h. That the State of Florida is to be commended for its concern over the quality of the education being furnished by its public school system.
- i. That the State of Florida may use a functional literacy examination for both remedial purposes and as a condition for the awarding of a diploma."

The question before the COMSC is whether a student in the K-12 public education system has a property right in a diploma. The *Debra P.* case supports an affirmative answer to the question, because the Washington State Legislature has specifically assigned the duty to establish high school graduation requirement or equivalencies for students to the State Board of Education through ***RCW 28A.230.090(1) High school graduation requirements—Reevaluation and report by state board of education—Credit for Courses taken before attending high school—Post secondary credit equivalencies.***

The State Board of Education has set graduation requirements in ***Chapter 180-51 WAC High School Graduation Requirements.*** As found in *Debra P.* (*id.* at 1080), setting expectations to be met before an award of a diploma clearly indicates to students a diploma is forthcoming to those students who successfully meet those expectations. ***WAC 180-51-025 Local school district application of state requirements,*** further defines the duty of setting expectations of the content of courses. Written policies adopted by local school district board of directors are to define requirements for subject areas. The listing of requirements in local school board policy gives students the expectation of a diploma upon successful completion of the requirements.

***Incorporating the Essential Academic Learning Requirements into Instruction,  
Measuring What has been Taught***

A second issue explored in the *G.I. Forum* case is whether the measurement items used in TAAS are based on what students actually learn. This issue must also be at the forefront of potential legal issues to be considered by the COMSC. The *G.I. Forum* court again defers to *Debra P.* as controlling and on point.

In the *Debra P.* opinion, the panel specifically holds, “g. That if a state is going to impose as a condition for receipt of a diploma a functional literacy test over and above whatever tests, examinations, or grading requirements exist for specific single classes (world history, business, mathematics, etc.), that test must be a fair test of material presented within those required courses of study.” *Id.* at 1080

The critical point of concern from *Debra P.* for the COMSC is its holding a state could go beyond its legal boundaries in implementing standardized tests, the passage of which is required for graduation. The key message sent by *Debra P.* is, a test required for graduation measuring what has

not been previously taught could be fundamentally unfair. If the test covers material not taught, it is unfair and violates equal protection and due process. *Debra P. v. Turlington*, 644 F.2d 397, 400 (1981).

The four Student Learning Goals and Essential Academic Learning Requirements (EALRs) of Washington State are the basis for the burden of local accountability for instruction to the goals and EALRs. The goals and EALRs were established by involving individuals from all over the state. Representatives from student, teacher, principal, school superintendent, local school boards, parent groups, local community and business community members, Educational Service Districts, Office of Superintendent of Public Instruction, State Board of Education, and the Governor's Office were all involved in the development and refinement of the EALRs. The EALRs have been distributed to local school district employees, the press, parents, and others and are available to anyone who wishes a copy.

The EALR foundation has been laid solidly. The responsibility for teaching the EALRs is laid at the local school district's door through a combination of state laws, Revised Code of Washington, and rules, Washington Administrative Code. Those laws and rules and discussion are as follows:

(1) ***RCW 28A.150.210 Basic Education Act—Goal***, designates the local school district as responsible for the “opportunities for all students to develop the knowledge and skills essential to meet the four major learning goals;”

(2) ***RCW 28A.655.060(b)(1) Essential Learning Requirements, etc.*** assigns the duty of development of “a statewide academic system for use in the elementary, middle, and high schools to determine if each student has learned the essential academic learning requirements...” The obvious accountability for student learning of the EALRs must be placed squarely by the Office of the Superintendent of Public Instruction on the shoulders of the local school district;

(3) ***WAC 180-51-045(1) Notice to students, parents, and guardians***, defines occupational education as related to assistance of students to acquire and demonstrate competency for goals three and four;

(4) ***WAC 180-77A-004 Approval Standards for Vocational-technical Teacher Preparation Programs Based on Business and Industry Work Experience. Overview*** states, “These rules establish a performance based preparation system for educators that supports the Improvement of Student Achievement Act of 1993 (1209) which will enable educators to implement the Washington state student learning goals and essential academic learning. Requirements;”

(5) **WAC 180-78A-005 Approval Standards for Performance-Based Preparation Programs for Teacher, Administrators, and Educational Staff Associates.** *Purpose* defines the performance-based preparation system for educators as one, “that supports the Improvement of Student Achievement Act of 1993 (ESHB 1209) which will enable educators to implement the Washington state student learning goals and essential academic learning requirements;”

(6) **WAC 180-78A-010(8) Definition of Terms** defines “ ‘A positive impact on student learning’ ” as “a teacher through instruction and assessment has been able to document students’ increased knowledge and/or demonstration of a skill or skills related to the state goals and/or essential academic learning requirements;”

(7) **Chapter 180-78A Approval Standards for Performance-Based Preparation Programs for Teachers, Administrators, and Educational Staff Associates** is clear throughout its Sections, *Existing Approved Programs [-100(6)]; Program Approval Standards Program Design, Knowledge and Skills [220-(4) & (5)]; Residency Certificate Program-Specific Program Approval Standard [-265(1)], Residency Certificate Programs-Specific Program Approval Standard-Knowledge and Skills, Teacher [-270(1)]; Principal and Program Administrator, Instructional program [-270(2)(viii)] and Curriculum Design [-270(2)(ix)], School Counselor [-270(4), School Psychologist [-270(5)], School Social Worker [-270(6)],* that responsibility for state goals, essential academic learning requirements, and positive impact on learning will be part of the responsibilities of specific educational certificates for school employees.

RCW and WAC language should leave no doubt in the minds of any Washington State teacher or school administrator of his/her accountability for the essential academic learning requirements infusion in to classroom instruction for each student in the K-12 system. The importance of the responsibility of the local district should be paramount when legal ramifications of the Certificate of Mastery implementation are considered by the COMSC. Local school districts must accept the responsibility for student learning of the EALRs. Curriculum must be designed with the EALRs in mind, teachers must include the EALRs in their classroom instruction, districts must assure the EALRs are learned and must provide additional learning opportunities for those students who do not learn. All these tasks must be completed BEFORE the WASL to Certificate of Mastery examination becomes a formal graduation requirement.

After students have learned the EALRs, ***RCW 28A.655.005 Findings***, calls for an accountability system that is simple to use and understand, with predictable and fair consequences, ***RCW 28A.655.010 Washington Commission on Student Learning-Definitions*** defines student learning goals, essential academic learning requirements, performance standards, student assessment system, and performance-based education system, and ***RCW 28A.655.020 Academic Achievement and accountability commission—State-wide academic assessment system—Certificate of Mastery—Educational Pathways—Accountability—Reports and Recommendations—Washington Commission on Student Learning, Creation and Expiration***, establishes a commission to oversee the state's educational accountability system. As a result, the burden of accountability for a required test design to be used state-wide likely falls upon the state.

## **Disparate Impact**

The Washington State Board of Education may recall my concern over disparate impact of high stakes testing as witnessed in employment discrimination law when potential employees are tested. The aforementioned Arizona OCR complaint actually raises the issue in the context of my concern for Washington state, the potential significant negative disparate impact upon minority students when our Washington State high school students are faced with the high stakes impact of Certificate of Mastery testing.

Disparate impact in employment is often found by the application of the 4/5 or 80% rule. Many courts have adopted the 4/5% rule although the federal courts have not adopted a uniform disparate impact rule. The rule comes from an August 25, 1978 set of uniform testing guidelines adopted by several federal agencies. If the success rate of the protected class is less than 80% of the success rate of the majority (usually whites), then disparate impact can be found. The idea applied to school testing rather than employment testing would be the disparate impact or the failure rate of minorities v. whites. An example is: 100 white students tested and 50 fail for a 50% success rate; 30 minorities tested, 20 fail or 33% success rate,  $33\% \text{ success rate} / 50\% \text{ success rate} = 66\%$ . Disparate impact is found because the resulting percentage is less than 80%.

To date, the author has not found that the formula creates a disparate impact in testing, so long as remediation is offered and minority scores continue to rise. The COMSC needs to be careful to consider the possibility of an issue of disparate impact accompanying the implementation of the COM and be certain rigorous remediation efforts are also in place at the time.

## Reliability

Accompanying the accountability for test design is the issue of reliability or the correlation coefficient that measures self-consistency of a test. If the test is reliable, the same results are obtained each time it is administered. Most of the states surveyed used test design experts from testing and measurement companies to assure reliability. The key question of concern for the COMSC is whether the reliability of the COM Examination is legally sound, i.e. will it withstand a challenge in court? The United States Supreme Court has an interesting take on the matter. The Court states judges should not interfere with educational judgments by professional educators, so long as the professional judgment follows accepted academic norms. *Regents v. Ewing*, 474 U.S. 214, 225 (1985). Using testing expertise from a tests and measurements company to assure proper reliability will allow for well founded expert witness testimony to meet a legal challenge raised by parents and/or students in the K-12 system in Washington state. Again, a visit from Dr. Susan Phillips would be well worth the COMSC's time. Dr. Phillips is referenced repeatedly as an expert in issues of reliability and validity, the next issue to be discussed.

## Validity

For the purposes of this opinion paper/report, validity is defined as the extent to which a test measures what it is supposed to measure or the correlation between a test result and some performance called a criterion (except for content validity). Four types of validity are useful for the COMSC to consider: predictive, concurrent, construct, and content.

First, **predictive validity** of the COM Examination would indicate how well the test actually predicts some future performance. Predictive validity may not be available until the test is given and future performance is determined and compared back to test results. An example of future performance is the Grade Point Average compared to test results. The COMSC may wish to have some predictive validity methodology in place when the COM Examination is first required in 2007-08. Predictive validity would give a boost to the rationale for the COM Examination in the first place. The logic would be, because the COM Examination can predict "X" as a future performance, it is a responsible requirement for the SBE to make. A public policy argument for the COM Examination could then be made.



**Concurrent validity** measures a current situation. It measures an estimate of present performance, i.e. those who read with comprehension will also do well on a reading comprehension section of the test. Classroom teachers will likely find the most use from concurrent validity. Teachers could use the results, if valid, to help design lessons of assistance to those students not performing well on the COM Examination.

**Construct validity** is best understood through an understanding of the word construct. A construct is the meaning found through a series of related observations. Teachers form constructs daily in their classrooms. For instance, if a student pays close attention during lectures, completes daily assignments, turns in homework in a timely fashion, and scores above 95% in examinations, the teacher may say the student is an “A” level performer. In the context of the COM Examination, if the A student also performs well on the same subject matter presented by the classroom teacher, then a correlation between performance in the classroom and performance on the COM Examination would be said to be high in construct/concurrent validity.

**Content/curricular validity**, is very important for consideration by the COMSC, because it will likely be part of any legal challenge. Content/curricular validity measures the content of the classroom instruction as compared to the EALRs. **If teachers do not focus on the Essential Academic Learning Requirements, the student probably will not do well on the WASL 10/COM Examination.**

### **Proper Notice**

Introduction of a Certificate of Mastery as a requirement for a diploma adds an additional graduation step for students. The implementation of the COM Examination brings with it a legal question of proper notice to meet the due process rights of students. It has long been the opinion of Mr. Robert “Skip” Patterson, Senior Counsel, Assistant Attorney General for Washington state (retired), that four years is a minimum for adequate notice. *Review of the Legal Pitfalls Minimum Competency Testing Must Circumvent*, 1992. Mr. Patterson’s opinion is supported in case law. Citing again from *Debra P. v Turlington*, the U. S. District Court, M.D. Florida, Tampa Division, found by enjoining the implementation of a functional literacy examination passage requirement for graduation for four years the state would meet the past discrimination challenge raised by black students. 474 F.Supp.244, 245 (1979). Although the case was successfully challenged on other grounds, four-year notice requirement apparently remains intact.

To further support Mr. Patterson's opinion, the setting of the *Debra P. v. Turlington* cases is worthy of note. Until 1967, the State of Florida had a dual system of education, containing two complete and separate school systems for black and white students. Even black and white teachers maintained separate professional associations, *Id* at 250. In spite of the United States Supreme Court decisions in *Brown v. Board of Education of Topeka* in 1954, 347 U.S. 483 and the *Implementation Decision* in 1955, 349 U.S. 294, Florida continued with a dual education system. In *Brown*, the Court declared the "separate but equal" doctrine as having no application in the field of education and the segregation of children in public schools based solely on race as violating the Equal Protection Clause.

Finally, *Alexander v. Holmes County Board of Education* was decided in 1969 (369 U.S. 19), by the United States Supreme Court. In *Alexander*, the Court called for an immediate end to dual school systems. Florida entered a transition phase to integrate its school systems, physically completing the task in 1971.

However, the *Debra P.* Court held the award of a diploma unlawfully discriminated against black children. The court found the state had given inadequate notice prior to imposing objectives and tests with a diploma sanction. Therefore, the sanction was found to be in violation of the due process clause. Finally, the state was enjoined from requiring passage of the test as a graduation requirement for a period of four years.

Because Washington State has not had a dual system of education, the pressure to establish adequate notice is possibly less than in Florida and Mr. Patterson's four-year adequate notice recommendation continues to carry significant weight. The Certificate of Mastery's effective date 2007-08 was adopted by the State Board of Education in January, 2000. Four years prior notice appears to have been well established. **However, one word of caution would be for the COMSC to be very certain the testing requirements, including which EALRs will be tested, are in the hands of teachers teaching the subjects to be tested, at least four years ahead of the first affected graduation class, the class of 2008.**

### **Additional COM Test Taking Opportunities**

In a 1985, United States Supreme Court case, *Scott v. Ewing*, the Court considered whether a medical student, whose property interest was created by the University of Michigan's course of study, should be allowed a re-test of a final qualifying examination. 474 U.S. 214 (1985) Justice Stephen's opinion found the University did not violate Ewing's due process right when it did not allow a re-

examination. However, every state surveyed allowed re-examination of high states graduation tests. Although the *Scott* Court found otherwise, **a strong recommendation is made for additional COM examination opportunities after provision of rigorous remediation.**

### **Special Student Populations**

Potential student failure of a high stakes graduation test is of great concern to special population groups. All surveyed states accommodate at least one special population group. Three groups are most common, Special Education IEPed students, Limited English Proficient (LEP) students, and some form of Specific Learning Disabled (SLD) students. For each group, the same basic questions need to be answered for the COMSC. The questions are as follows:

- 1) Are testing accommodations allowed for students in the group? If so, what is the nature of accommodations allowed?
- 2) If a student in the group fails to pass the high stakes graduation test, is a diploma awarded to the student?
- 3) Are low scores or notations of failure of the high stakes graduation test placed on the diploma/certificate of completion?

## PART IV

### Conclusion and Recommendations

In *Regents of Michigan v. Ewing*, The United State Supreme Court held that the state could violate the Constitutional guarantee of fundamental fairness if it, “violates accepted educational norms.” 474 U.S. 214, 224. Washington state has involved all stakeholders in the development of its educational reform efforts. Accommodations allowed for special populations have been developed with care not to violate the reliability and validity of the Washington Assessment of Student Learning (WASL). *Guidelines for Participation and Testing Accommodations for Special Populations on the Washington Assessment of Student Learning (WASL)* (June, 2000). Proper notice of the implementation of a diploma sanction given to students, parents and educators is eight years, far beyond the recommended four years. Again, the caution is given to the COMSC to be very certain **the testing requirements, including which EALRs will be tested, are in the hands of teachers teaching the subjects to be tested, at least four years ahead of the first test date in 2007-08.**

Finally, validity and reliability is assured and recorded in technical reports available to the public. Incorporated and filed, as **Q**, is a Technical Report, *Washington Assessment of Student Learning, Grade 10, 1999, Technical Report, April 17, 2001*, prepared by Dr. Catherine S. Taylor of the University of Washington.

At least five tasks remain for the state to complete to assure preparation for eventual legal action. **First**, a decision must be made if alternative testing or routes will be available to students who might not otherwise pass the COM Examination. Alaska allows local school boards to grant waivers to students, and Indiana has a statute allowing waivers. Alaska and Arizona provide an alternate assessment, and Arizona gives a Spanish version to Spanish speaking students. Whatever Washington state decides to do, it must be definitive and leave no doubt of its intentions.

**Second**, a decision must be made if student success using alternative testing routes will lead to the award of a diploma. Arizona allows the alternative test route to lead to the award of a diploma.

**Third**, a decision must be made whether COM Examination **scores**, both or either passing or failing, will be placed on a student’s diploma, certificate of completion and/or a transcript. Wisconsin requires the recording of high stakes exit examination scores on transcripts. Currently, pursuant to **WAC 180-51-063(2)(g) Certificate of mastery—High school graduation requirement—Effective date**

and **WAC 180-57-070(12) Mandatory high school transcript contents--Items**, only a notation of meeting the standard or earning the COM is made to a student transcript. Actual student scores are not mentioned.

Drawing on my extensive background in curriculum development and testing and measurements, I suggest development of the Washington State Assessment of Student Learning (WASL) was in step with current educational norms as suggested in *Regents v. Ewing*, 474 U.S. 214, 225 (1985). Therefore, as a **fourth** step, it is critical the state assure the EALRs have been taught **BEFORE** the COM Examination is given. Alaska, Arizona, Massachusetts, and Wisconsin are states who have local district/school reporting systems certifying the teaching and learning of EALR-like requirements. It is paramount the state shift the burden of assurance of EALR incorporation into curriculums and classrooms to the local level where students are actually taught and held responsible to learn the EALRs. To do so will require a similar local district/school reporting system to the other four states..

The problem creating a significant legal liability for the State Board of Education is the lack of individual accountability to each student for the teaching of each EALR BEFORE it is tested. The key legal issue is whether the SBE can reduce its liability and place responsibility where it belongs, at the local level, with local school boards, superintendents, principals, and teachers.

**Fifth**, curriculum must be clearly aligned with the EALRs, teachers must be trained in appropriate methodology to design lessons with specific focus on student achievement of the EALRs and be given adequate resources to implement the required curriculum. Instructional materials must be purchased only after proof of alignment with the EALRs and principals must be trained to adequately evaluate student achievement of EALRs in every student's classroom. Local school board members need to be certain, through their superintendents, that their districts' progress toward implementing school reform is legally adequate.

The buck truly has to stop where the question, "Has each student learned and can each student apply the EALRs at the appropriate level?" is best answered. It is my opinion the buck stops at the classroom door. It is also my opinion Washington state educators are up the challenge, given enough resources and adequate notice. Among the resources already in place are many well-informed contacts at the Office of Superintendent of Public Instruction and the nine Educational Service Districts.

Much work has been completed as part of the on-going implementation of Washington state's performance based education system. The State can be confident that certain legal issues have been

more than adequately addressed. The State must also recognize and acknowledge that other issues need far more attention before it can have the confidence it will successfully meet any legal challenge to the WASL 10/COM as a state graduation requirement.

## APPENDIX A

## GLOSSARY

ACRONYM	FULL NAME
A+ CMSN	Academic Achievement and Accountability Commission
AIMS	Arizona's Instrument to Measure Standards
AERA	American Educational Research Association
COM	Certificate Of Mastery
COMSC	Certificate Of Mastery Study Committee (of the SBE)
CSL	Commission on Student Learning
CTB	
EALRs	Essential Academic Learning Requirements
ESDs	Educational Service Districts
ESL	English as a Second Language
FOIA	Freedom Of Information Act (federal)
GQE	Graduation Qualifying Examination (Indiana)
HSEE	High School Exit Examination (North Carolina)
HSGQE	High School Graduation Qualifying Examination (Alaska)
HSGT	High School Graduation Test (Wisconsin)
IDEA	Individuals with Disabilities Education Act (federal)
IEP	Individualized Education Plan
ISTEP+	Indiana Statewide Testing for Educational Progress+
LEP	Limited English Proficiency
MCAS	Massachusetts Comprehensive Assessment System
NCOSEA	National Council Of State Education Attorneys
NCREL	North Central Regional Educational Laboratory
NCS	National Computer Systems
OCR	Office of Civil Rights
RCW	Revised Code of Washington (laws)
SBE	State Board of Education
SLD	Specific Learning Disabled
SLGs	Student Learning Goals
SLOs	Student Learning Objectives
SPI	Superintendent of Public Instruction
TAAS	Texas Assessment of Academic Skills
WAC	Washington Administrative Code (rules)
WASL	Washington Assessment of Student Learning

NAME	TITLE	E-MAIL ADDRESS
Dr. Richard Smiley	Assessment Director, Department of Education and Early Development, Alaska	<a href="mailto:Richard_Smiley@eed.state.ak.us">Richard_Smiley@eed.state.ak.us</a>
Dr. Paul S. Young	Director, Academic Standards and Accountability, Department of Education, Arizona	<a href="mailto:pyoung@ade.az.gov">pyoung@ade.az.gov</a>
Kevin McDowell	General Counsel, Department of Education, Indiana	<a href="mailto:kmcdowel@doe.state.in.us">kmcdowel@doe.state.in.us</a>
Rhoda E. Schneider	General Counsel, Department of Education, Massachusetts	<a href="http://www.doe.mass.edu">www.doe.mass.edu</a> (for info on MCAS, initiatives statutes, regulations)
Dr. Lou Fabrizi	Director, Division of Accountability Services, Department of Public Instruction, North Carolina	<a href="mailto:Lfabrizi@dpi.state.nc.us">Lfabrizi@dpi.state.nc.us</a>
Dr. Maggie Burke	HSGT Development Director	<a href="mailto:maggie.burke@dpi.state.wi.us">maggie.burke@dpi.state.wi.us</a>
Dr. Susan Phillips	Consultant	<a href="mailto:PhillipsSE@earthlink.net">PhillipsSE@earthlink.net</a>



**Survey Questions  
For Washington State Board of Education  
High Stakes Testing, Selected States  
Spring 2001**

- 1. What state-level tests are given to high school students?**
- 2. In any of these tests, can a single test prevent a student from attaining a high school diploma?**
- 3. Does the state give or is it contemplating giving an exit test for a high school diploma?**
- 4. If so, what is the date of implementation?**
- 5. How was the test developed?**
- 6. How did the state assure validity, reliability? Did the state assess validity and reliability against the recommended standards of the American Educational Research Association?**
- 7. What are the consequences of the exit test—the impact on the student?**
- 8. Have you had any legal challenges to the high school exit test (or any other state wide-tests)? If so, briefly describe the ground or grounds for the challenge.**
- 9. Do you anticipate any legal challenges to the high school exit test (or any other state wide-tests)? If so, briefly describe the expected or known ground or grounds for the challenge.**
- 10. What were the results of those legal challenges, including any pending?**
- 11. Will you e-mail or send me any info (hardcopy) about the challenges?**
- 12. Are special education students exempt from the high school test? If not, how are they assessed?**
- 13. Are any other groups exempted from taking the high school test? If so, please list. If so, how are they assessed?**
- 14. Does the state allow any accommodations for students taking the high school test? If so, what are those accommodations?**
- 15. Do high school age, special education students receive a high school diploma, even if they do not pass the high school test? Is any indication given that the students have not passed the test (i.e. transcript, diploma notation)?**

16. Have you received any legal opinion from your state attorney general's office about the high school exit test?
17. Have you developed any procedures, processes, or means to collect evidence to verify that students had an opportunity to learn before taking a high stakes exam (i.e., passage required before award of diploma)?
18. Is there any other information that you could share about high stakes testing that would benefit us in Washington State?

Again, thank you for all your help.

Please use the enclosed, self-addressed envelope to return the survey to:

Catherine Hardison, PhD  
1213 North 20th Avenue  
Yakima, Washington 98902-1287

Questions?

Call me at 509.454.8994 home phone  
509.910.0616 cell phone  
E-mail me at [hardicag@AOL.com](mailto:hardicag@AOL.com)